APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,670.

JEROME S. MURRAY and GRACE H. MURRAY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued December 9, 1966. Decided January 6, 1967.)

Before HAYNSWORTH, Chief Judge, and BRYAN and J. SPENCER BELL, Circuit Judges.

Stanley Worth (Scott P. Crampton, Joseph A. McMenamin and Korner, Doyle, Worth & Crampton on brief) for Petitioners, and Lawrence B. Silver, Attorney, Department of Justice, (Mitchell Rogovin, Assistant Attorney General, Meyer Rothwacks and Fred R. Becker, Attorneys, Department of Justice, on brief) for Respondent.

PER CURIAM:

This is a petition for review of a decision of the Tax Court finding that certain sales of real estate made by the husband were sales of capital assets, while other sales of real estate or of contractual interests in real estate, were of property held primarily for sale to customers in the ordinary course of Murray's business.

For the reasons stated by the Tax Court,[1] we deny the petition. Judge Kern's opinion is entirely consistent with the subsequent decision of the Supreme Court in Malat v. Riddell, 383 U.S. 569. Nothing in *Malat* requires a modification of the result in the Tax Court.

Affirmed.

[1] Jerome S. Murray and Grace H. Murray v. Commissioner of Internal Revenue, T.C. Memo. 1965-148.

APPENDIX B

[Filed January 6, 1967]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,670.

JEROME S. MURRAY and GRACE H. MURRAY,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

THIS CAUSE came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,670.

JEROME S. MURRAY and GRACE H. MURRAY,
Taxpayers-Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

PETITION FOR REHEARING

Under the provisions of Rule 19 of the Rules of this Court, the taxpayer hereby petitions for a rehearing and reconsideration by this Court of its per curiam opinion entered herein on January 6, 1967, for the following reasons:

I. The Court Erred in Holding That the Tax Court's Opinion Is Entirely Consistent With the Decision of the Supreme Court in Malat v. Riddell

In connection with the holding that the opinion and decision of the Tax Court is consistent with *Malat* v. *Riddell*, 383 U.S. 569, 16 L.Ed. 2d 102 (1966), the Court's attention is respectfully directed to what the taxpayer conceives to be inconsistencies, resulting in conflict with the principles laid down in *Malat:*

1. To qualify as "profits and losses arising from the everyday operation of a business" under *Malat*, it must appear from the record facts that the taxpayer was selling real estate, or interests therein, to customers in the ordinary course of his business. As pointed out in taxpayer's briefs,[1] there are no evidentiary facts to support such a conclusion; instead, the facts found by the Tax Court support the opposite conclusion.[2] The Gordon contract for the purchase of some 500 acres of land was sold in 1955 to a purchaser who made an unsolicited offer to purchase the contract (App. 25-26). The taxpayer never acquired title to the land covered by the contract (App. 26), hence he had no opportunity to carry out his intentions of exploring the possibilities of engaging in timber, mining, or other operations relating to the land.[3]

2. The sale of the Gordon contract occurred in 1955. It was one of 5 sales in that year, all of which were treated by the Commissioner as capital gain transactions in the year 1955 (App. 13; Prin. Br. 9). The record does not show any sales by the taxpayer made in 1955 as a dealer in real estate. Nor is there any other evidence of record that any of the sales made in 1955 related to the everyday operation of a business by the taxpayer involving the sale of real estate to customers in the regular course of his business.

3. The "realization of appreciation in value" of the Gordon contract "accrued over a substantial period of time," hence it was properly determined by the Commissioner to result in a long-term capital gain in the year of sale (1955).

4. The limited number of sales by the taxpayer in 1955, all of which were determined to be capital gain trans-

---

[1] Prin. Br. 9, 16; Rep. Br. 8-9.

[2] App. 9; Prin. Br. 15.

[3] The Tax Court's opinion stated (App. 52): "The only evidence of such intent and purpose was the unsupported self-serving testimony of Murray himself. It is not corroborated by the circumstances." But see Rep. Br. 12-13.

actions, established that the "primary" or "principal" business of the taxpayer in 1955 was that of an investor who was holding property for "the realization of appreciation in value accrued over a substantial period of time" under *Malat* (383 U.S. at 572).

II. The Per Curiam Opinion Conflicts With Arrowsmith v. Commissioner

Arrowsmith v. *Commissioner*, 344 U.S. 6, 97 L.Ed. 6 (1952), in clear terms, laid down the principle that in the case of a sale or exchange the character of the transaction is fixed at the time of the sale or exchange. In that case, in the year of the exchange (liquidation) the resulting gain was held to be a capital gain. Accordingly, all subsequent transactions relating to such exchange were capital gains or losses, as the case may be.

The principles laid down in *Arrowsmith* have not been qualified or amended by the Supreme Court and, accordingly, apply in the instant case. *Arrowsmith* has been followed consistently by various Courts of Appeals. *Campagna* v. *United States*, 2 Cir., 290 F.2d 682 (1961); *Wener* v. *Commissioner*, 9 Cir., 242 F.2d 938 (1957); *Commissioner* v. *Adam, Meldrum & Anderson Co.*, 2 Cir., 215 F.2d 163 (1954); *Duveen Bros., Inc.* v. *Commissioner*, 2 Cir., 197 F.2d 118 (1952); Mertens, *Law of Federal Income Taxation*, 1966 Revision, § 22.24, n. 6, 7, and § 22.97, n. 59.

Under the *Arrowsmith* principle the treatment by this taxpayer, and by the Commissioner, of the sale of the Gordon contract in 1955 as a long-term capital gain transaction, fixed the character of the transaction. Subsequent collections by the taxpayer in the years here involved, under the installment method of reporting, necessarily required the same treatment, as capital gain transactions, that was given the sale in 1955, to comport with the *Arrowsmith* principle. Yet for the years here involved, the Tax Court disregarded the nature of the sale in 1955 as a capital gain transaction (so recognized and determined

by the Commissioner for that year), in holding that collections pursuant to that sale which were received by the taxpayer in later years constituted ordinary income. The Tax Court sustained the Commissioner in that respect.

Although *Arrowsmith* was fully briefed by the taxpayer in his principal brief and his reply brief, filed herein, the per curiam opinion gives no indication that the taxpayer's contention that *Arrowsmith* controlled in the instant case was even considered by the Court; or, if considered, it was distinguished on specific grounds, not stated in the opinion. In fact, the opinion is silent as to *Arrowsmith*.

Respectfully submitted,

SCOTT P. CRAMPTON
STANLEY WORTH
700 Brawner Building
Washington, D. C. 20006

JOSEPH A. MCMENAMIN
928 Bowen Building
Washington, D. C. 20005

Attorneys for Taxpayers-Petitioners

KÖRNER, DOYLE, WORTH & CRAMPTON
700 Brawner Building
Washington, D. C. 20006
Of Counsel

Certificate of Counsel

The undersigned, counsel for the taxpayers-petitioners in the above-entitled case, hereby certify that this petition for rehearing is signed in good faith, and not for delay.

SCOTT P. CRAMPTON
STANLEY WORTH
JOSEPH A. MCMENAMIN

APPENDIX D

Internal Revenue Code of 1954:

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;

• • • •

(26 U.S.C. 1958 ed., Sec. 1221.)

SEC. 1234. OPTIONS TO BUY OR SELL.

(a) TREATMENT OF GAIN OR LOSS.—Gain or loss attributable to the sale or exchange of, or loss attributable to failure to exercise, a privilege or option to buy or sell property shall be considered gain or loss from the sale or exchange of property which has the same character as the property to which the option or privilege relates has in the hands of the taxpayer (or would have in the hands of the taxpayer if acquired by him).

• • • •

(c) NON-APPLICATION OF SECTION.—This section shall not apply to—

(1) a privilege or option which constitutes property described in paragraph (1) of section 1221;

(2) in the case of gain attributable to the sale or exchange of a privilege or option, any income derived in connection with such privilege or option which, without regard to this section, is treated as other than gain from the sale or exchange of a capital asset;

(3) a loss attributable to failure to exercise an option described in section 1233(c); or

(4) gain attributable to the sale or exchange of a privilege or option acquired by the taxpayer before March 1, 1954, if in the hands of the taxpayer such privilege or option is a capital asset.

• • • •

(26 U.S.C. 1959 ed., Sec. 1234.)